NOTE AND COMMENT

With all but one of the first group elected as editorial assistants for this year engaged in serving their country, it is evident that the REVIEW, too, must feel the pinch of the Great War. Every effort will be made to keep up to the standard of previous years. Inevitably, however, the amount of material available for publication will be much less than in normal times.

THE LAW SCHOOL.—The attendance has fallen off 52%. From the beginning there has been manifested a most inspiring patriotic spirit, and the falling off undoubtedly is due to a generous response to the call of the nation. Prophetic, perhaps, of the future, there has been a 200% increase in the number of young women in the Law School, there being six at the present time.

During the absence of Dean Bates, who is to be at the Law School of Harvard University on leave of absence for one year, the administration of the Law School is in the hands of a committee of five: Professors Goddard, Lane, Wilgus, Sunderland and Holbrook. Professor Goddard acts as Chairman of this committee, while Professor Holbrook succeeds to the office of Secretary.

At the close of last year, Professor Bogle, who during the last ten years has suffered not a little from ill health, resigned. His course in Common Law Pleading will be given by Professor Sunderland. Professor Durfee has dropped Criminal Law and takes Trusts. Professor Holbrook will conduct the course in Criminal Law. Professor Grismore, who on the death of Professor Knowlton, last December, took Contracts, has entered the Army. Professor Stoner will give Contracts this year. Dean Bates' course in Constitutional Law will be given by Professors Goddard and Waite, the former for the first semester, and the latter during the second. The smaller number of students with the consequent reduction in number of sections has made these changes feasible.

Professor Thompson, who taught in the Law School from 1888 to 1911 and who since the latter year has been Professor Emeritus, died September 29.

PROHIBITING ADVERTISING ON WALLS AND BUILDINDS UNDER THE POLICE POWER.—There have been many unsuccessful attempts by city authorities of late to abolish or prevent unsightly billboards and advertising. In a recent case A was arrested and fined for violating a city ordinance prohibiting the display of advertising matter on walls and buildings within the city without the consent of the city council. On refusal to pay the fine A was held in the custody of the city marshal, and brought *habeas corpus* to secure his release. The court held that the affidavit charged no violation of the ordinance unless it were construed as prohibiting the painting of *any* sign on walls or buildings within the city, and the ordinance, if properly so construed, was

invalid as constituting a taking of private property for public use without compensation. *Anderson* v. *Shackelford* (Fla. 1917), 76 So. 343.

The court in this case refuses to extend the police power to prevent offenses against public taste. In this it is in accord with the consensus of opinion as evidenced by the decided cases, weakened by not a single dissent. *Passaic* v. *Paterson Bill Posting, &c. Co.*, 72 N. J. L. 285, 62 Atl. 267; *Bill Posting Sign Co.* v. *Atlantic City*, 71 N. J. L. 72, 58 Atl. 342; *City of Chicago* v. *Gunning System*, 214 Ill. 628, 73 N. E. 1035; *People* v. *City of Chicago*, 261 Ill. 16, 103 N. E. 609; *People* v. *Murphy*, 195 N. Y. 126, 88 N. E. 17. In argument against such limitation of the police power use has been made of the analogy of billboards to smoke, noise and obnoxious odors, which may be prohibited by ordinances enacted under the police power of a city. *Rochester* v. *Macauley-Fien Milling Co.*, 199 N. Y. 207, 92 N. E. 641; *Glucose Refining Co.* v. *Chicago*, 138 Fed. 209; *St. Paul* v. *Haugbro*, 93 Minn. 59, 100 N. W. 470 (smoke); *Commonwealth* v. *Patch*, 97 Mass. 221; *Grand Rapids* v. *Weiden*, 97 Mich. 82, 56 N. W. 233 (obnoxious odors); *Goodrich* v. *Busse*, 247 Ill. 366, 93 N. E. 292; *New Orleans* v. *Fargot*, 116 La. 370, 40 So. 735 (noises and unsightly buildings and advertising signs); FREUND, POLICE POWER, sec. 182. There are, however, two respects in which the analogy fails. First, all or nearly all of the cases upholding ordinances enacted under the police power to prohibit odors, noises and smoke, including those above cited, emphasize the deleterious effect of such nuisances on the health of the community, and there can be little doubt that these things cause actual physical discomfort to those offended by them and are injurious to the general health of such persons. Few, if any, esthetes who are offended by the sight of ugly signs will attribute any real physical discomfort or injury to such unsightliness. Second, the group of persons in any community who are offended by the display of inartistic advertising matter is infinitely smaller than the group of those who are offended by noise, bad odors and dense smoke.

The determination of the existence of a nuisance is made to depend upon the presence of actual physical discomfort to persons of ordinary sensibilities, *McGill* v. *Pintsch Compressing Co.*, 140 Iowa 429, 118 N. W. 786; *Wolcott* v. *Doremus* (1917), 101 Atl. 868, and the same test seems to have been uniformly applied by the courts where an attempt has been made to prevent the display of unsightly, but not immoral, advertising. The growth of civic pride and the education of the masses in art coupled with a more general belief in the intimate relation between mental contentment and physical wellbeing may work the desired extension of the police power in the future to prevent unsightly billboards and advertisements without abandonment of this test.

The instant case must be distinguished from cases upholding ordinances prohibiting the erection of billboards of a certain kind or in certain localities on the ground that they tend to encourage crime, increase the fire hazard and harbor nuisances dangerous to the public health. *St. Louis Gunning Co.* v. *St. Louis*, 235 Mo. 99, 137 S. W. 929; *Cusack Co.* v. *Chicago*, 267 Ill. 344, 108 N. E. 340, affirmed, 242 U. S. 526. It must also be distinguished

from cases declaring valid ordinances prohibiting "museums of anatomy," displaying models, pictures and charts of the human body, as the purpose of such ordinances is clearly the protection of the public morals. *Chicago* v. *Shaynin,* 258 Ill. 69, 101 N. E. 224. G. S.

RIGHTS IN PERCOLATING WATERS.—Almost without exception the courts approve of *Acton* v. *Blundell,* 12 M. & W. 324, to the extent of its actual decision,—that where as a result of improvement or enjoyment of one's own land one conducts operations which draw off percolating waters from a neighbor's land, even to the extent of drying up a well or spring, such inconvenience is to be deemed *damnum absque injuria.* The doctrine of the court "that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure," if intended to be taken as broadly as stated and not limited to the facts then before the court, has not received such uniform support.

In *Chasemore* v. *Richards,* 7 H. L. Cas. 349, that doctrine was applied to a case where percolating waters were drawn off by powerful pumps, the water being conducted some distance away for use. And in *Mayor* v. *Pickles* [1895], A. C. 587, it was held that even though the abstraction was malicious the result should be the same.

On the other hand in *Meeker* v. *East Orange,* 77 N. J. L. 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798, it was held that the right of an occupant of land as against neighbors to abstract percolating waters was not absolute, but relative, that the doctrine of "reasonable use" applied. About all there is to be said against *Chasemore* v. *Richards* was said by Chancellor Pitney in the New Jersey Case. The opinion contains not only a thorough discussion of the problem on principle but also a review of the decided cases.

In *Schenk* v. *City of Ann Arbor,* 163 N. W. 109 (May 31, 1917), the Michigan court repudiates *Chasemore* v. *Richards,* the court contenting itself with quoting from and following *Meeker* v. *East Orange, supra,* and *Hathorn* v. *Natural Carbonic Gas Co.,* 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555. Four justices dissented, but not on the fundamental question.

One feature of *Chasemore* v. *Richards* perhaps has not been sufficiently emphasized. The plaintiff there was the owner and operator of a mill operated by water power, developed by a stream, a part of the supply of which was the percolating water cut off by the defendant. The water abstracted had not reached the stream nor any tributary thereof—it was not stream water any more than rain water wandering over the surface is stream water. The rights of the plaintiff were those of a riparian proprietor to have a reasonable use of the waters of the stream and the defendant no doubt owed him a duty not to make an unreasonable use of the waters of the stream. In truth, however, the defendant had not done anything with the water of the stream, not any more than had the defendant in *Broadbent* v. *Ramsbottom,* 11 Ex. 602.